**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **RITA M. RENNERT** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 208,749 |
| **DILLON COMPANIES, INC.** | ) | |
| Respondent | ) | |
| Self-Insured | ) | |

## ORDER

Claimant appeals the Award of Administrative Law Judge Julie A. N. Sample dated April 22, 1998. The Administrative Law Judge awarded claimant a 9 percent whole body permanent disability, finding claimant had suffered a work-related injury and had provided timely notice of the accident. However, the claimant was denied additional periods of temporary total disability. Oral argument was held on April 28, 1999.

### APPEARANCES

Claimant appeared by her attorney, James E. Martin of Overland Park, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

### RECORD AND STIPULATIONS

The record, as set forth in the Award of the Administrative Law Judge, is adopted by the Appeals Board. The stipulations, as set forth in the Award of the Administrative Law Judge, are adopted by the Appeals Board. In addition, the parties stipulate that, should this matter be found compensable, claimant has a 9 percent whole body functional impairment pursuant to the Award of the Administrative Law Judge. This eliminates the nature and extent of claimant's injury and/or disability as an issue, as no work disability is claimed.

### ISSUES

Claimant raised the following issue in her Request For Review: "Whether the Administrative Law Judge erred in his failure to award additional temporary total disability compensation benefits."

At the time of oral argument, claimant advised the Appeals Board that she intended to file a motion to dismiss this appeal. This Motion to Dismiss was filed with the Division of Workers Compensation on April 28, 1999. Claimant's Motion to Dismiss will be considered as a separate issue on appeal.

The following issues are raised in claimant's letter of February 9, 1998, and in respondent's brief to Board:

(1) Whether the claimant met with personal injury by accident.

(2) Whether the alleged personal injury by accident arose out of and in the course of her employment with respondent.

(3) Whether claimant gave notice to respondent in a timely manner.

(4) Whether the claimant is entitled to be paid additional temporary total disability compensation from November 2, 1995, to May 26, 1996, a period of 36 weeks at the rate of $265.95.

(5) Whether the claimant should be reimbursed or have paid in her behalf $252.00 for unauthorized medical with Family Practice Associates, Chartered.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

### FINDINGS OF FACT

Claimant alleges accidental injury on November 2, 1995, while working in respondent's bakery department. Claimant was frequently required to retrieve products from the receiving room. On the date of the alleged accident, she was in the process of doing so, when she alleges she lifted several boxes of frozen dough, and injured her back. At that time, claimant testified she was also suffering from a cold and, for unknown reasons, did not associate the pain in her low back and legs with her lifting injury. Rather, she thought the cold had just "gone into her back."

When claimant returned to the bakery, her coworker, Mary Garrens, observed claimant appeared to be in pain. When Ms. Garrens inquired, claimant denied an injury and instead attributed the problem to her cold. When being questioned by a supervisor, claimant again denied any injury, explaining she had a cold. However, claimant's complaints of pain and symptoms continued for several days. At that time, claimant sought treatment from her own personal physician.

Claimant was first seen by a physician's assistant named Ronald Dean Haulmark on November 7, 1995. At that time, claimant had complaints of back pain. The history provided to Mr. Haulmark by claimant indicated she was injured while moving furniture at home. There was no indication at that initial visit that claimant suffered any type of work-related accident. At that time, Mr. Haulmark diagnosed myofascial pain syndrome, secondary to probable strain. He assumed that the injury was caused by moving the furniture.

Claimant returned to the Family Practice Associates, and was seen by Dr. Maria Palmeri on November 13, 1995. At that time, claimant was in extreme pain, with symptoms in her low back. No additional history was provided which, according to Dr. Palmeri, indicated that the information in the previous note from November 7 was accurate. Again, no mention was made of any work-related injury.

Claimant was next seen on December 5, 1995, by Mr. Haulmark. The note of that same date does not indicate this to be a work-related matter. No history of a work-related injury was provided to Mr. Haulmark.

Claimant was next seen on December 11, 1995, by Dr. Palmeri. Again, the note does not indicate the claimant's complaints were work-related. Claimant was, at that time, undergoing physical therapy. Claimant indicated to Dr. Palmeri that the physical therapy was making her back worse. This was the last time Dr. Palmeri saw claimant for this particular condition. Claimant was taken off work from December 11, 1995, until December 18, 1995.

The first time that claimant alleged this to be a work-related injury was on the workers' compensation form filled out in Dr. Palmeri's office on January 16, 1996. Dr. Palmeri did indicate at the time of the December 11 visit that claimant needed to be referred to an orthopedic surgeon, and claimant should be off work. There was an indication in the December 11 file that claimant "does lifting." This could mean that claimant was lifting at work, although it does not specify. Only on the January 16, 1996, physician's report blank was there an indication that claimant's injury was caused by her work. Mr. Haulmark had no idea how that particular form came into the file. It could have been provided by claimant, by the insurance company, or by the employer.

Claimant was examined at respondent's request by Dr. Donald T. Mead. Dr. Mead has been practicing since 1990, but is not yet board certified in any medical field. He is currently employed by Occupational Health Services in Kansas City. Dr. Mead examined claimant on November 28, 1995. At that time, he received a history of a work-related injury, and performed a physical examination. Claimant's objective findings were abnormal, including a limited range of motion. X-rays were normal, and claimant's neurological examination beyond the range of motion studies was normal.

Dr. Mead diagnosed lumbar strain. He felt there was some symptom magnification. When claimant was given the Waddell's test, claimant failed five out of the five Waddell's test findings. He placed claimant on anti-inflammatories and muscle relaxants, and referred her to physical therapy. He restricted claimant from lifting over 10 pounds, and advised against pushing and pulling over 10 pounds, and no prolonged walking or standing, which he clarified to be 75 percent of the time.

He next examined claimant on December 4, 1995, at which time she complained of reactions to the medication and lumbar pain, but Dr. Mead found no significant changes in the examination. The neurological examination was again normal, which confirmed that they were dealing with a lumbar strain. He felt claimant was capable of continuing work within the limitations placed upon her. A return appointment was scheduled for December 11, 1995, but claimant missed that appointment. Based upon the two limited visits he had with claimant, he diagnosed a lumbar strain, which he anticipated would have resolved within four to six weeks. The physical therapy notes indicated claimant only attended five out of twelve scheduled sessions. Dr. Mead would have preferred claimant attend all twelve sessions, and felt that five out of twelve was not a good faith effort on claimant's part. Had she attended the physical therapy program as originally scheduled, Dr. Mead would have expected claimant to return to her pre-injury functional capacity level.

When claimant first reported the injury to Dr. Mead, she indicated that she had only minor symptoms on November 2. It apparently took several days before the full symptoms developed. On cross-examination, there was some question raised regarding whether the physical therapy was prescribed for a total of twelve visits or a total of six visits. The indication was that claimant was to attend three times a week, for two weeks. This would indicate that claimant attended five out of six visits, rather than five out of twelve.

On May 24, 1996, claimant was referred by respondent to Dr. Jeffrey T. MacMillan, a board certified orthopedic surgeon specializing in spinal disorders. He performed an examination of claimant at that time, and diagnosed symptoms characteristic of fibromyalgia. He did not believe claimant capable of performing any work at that time. The primary reason for him reaching this conclusion was that claimant was tearful throughout most of the interview, and she complained of great difficulty sleeping. The next visit was on June 10, 1996, at which time claimant indicated the Elavil that Dr. MacMillan had prescribed had improved her sleep habits. He felt claimant was capable of returning to a

work conditioning program at that time, which he recommended. Claimant also advised Dr. MacMillan that she was depressed and in a shaky emotional state because her marriage was breaking up. He felt claimant's mental state was most likely the result of claimant's personal problems. He next saw claimant on August 8, 1996. The progressive exercise program he had referred her to consisted of 30 scheduled days, of which claimant attended 29. He saw a dramatic improvement in almost all of claimant's activity levels. Claimant lost a significant amount of weight, and improved both physically and mentally. She advised him that she had a significant improvement in her back pain. At that time, he started her with physical therapy, full days instead of half days, and her work conditioning program became a work hardening program. He also provided a list of light duty restrictions claimant could work within.

By the next appointment of September 5, 1996, claimant had returned to light duty with respondent. Although she was still having a little low back pain, her weight loss continued and her trigger point tenderness continued to improve. The September 5 note indicates claimant had lost 54 pounds. By that time, claimant was not participating in a formal physical therapy program, but was simply spending most of her time at work. Dr. MacMillan increased her activity level. Dr. MacMillan next examined claimant on October 10, 1996. At that time, there were no significant changes in her condition. He felt claimant could return to her regular work at that time without restriction.

Dr. MacMillan last examined claimant on November 1, 1996, at which time claimant's symptoms had resolved. He diagnosed resolved low back pain and resolved fibromyalgia. Claimant indicated she was functioning more or less pain free, except for heavy lifting. Claimant had no radicular symptoms at that time. Claimant's neurological examination was normal, with the exception of a slight low back extension limitation. Dr. MacMillan rated claimant at 2 percent functional impairment to the body as a whole pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). This 2 percent came from the limited lumbar extension findings.

Dr. MacMillan acknowledged that a physician, who had the opportunity to examine and treat claimant in November 1995, would be in a better position to provide an opinion regarding claimant's restrictions and limitations, before he first examined her on May 24, 1996. He did acknowledge that fibromyalgia is a condition that can worsen with inactivity. As of Dr. MacMillan's examination of May 24, 1996, he did indicate that claimant was temporarily totally disabled. The August 8, 1996, report indicated claimant would remain temporarily totally disabled for approximately one more week, with a return to work on August 19, 1996. Dr. MacMillan acknowledges he had no idea what claimant's condition was like between December 1995 and his May 24, 1996, first visit.

Claimant was referred by her attorney to Dr. Edward J. Prostic, an orthopedic surgeon in Overland Park, Kansas. He examined claimant on December 9, 1996, at which time claimant gave him a history of suffering a work-related injury to her low back.

Claimant's condition had progressively worsened, and she sought medical treatment from Dr. Palmeri. At the time of Dr. Prostic's examination, claimant had complaints in her right low back with radiculopathy. Repetitious lifting at work caused claimant's symptoms to worsen. During the claimant's physical examination, Dr. Prostic found a mild restriction of flexion and extension, with lateral bending restricted to one-half on each side. X-rays of the lumbar spine indicated spinal narrowing at L3, L4 and L5, with small anterior traction osteophytes at most lumbar disc levels, and a posterior facet arthrosis at L5-S1. Dr. Prostic diagnosed chronic sprain and strain of her lumbar spine, superimposed upon degenerative disc disease. He restricted claimant to lifting no greater than 35 pounds occasionally or 15 pounds repetitively, and assessed claimant a 12 percent permanent partial impairment to the body as a whole based upon the AMA Guides, Third Edition (Revised). He opined that claimant was more probably than not disabled from the accident of November 1995 until she was seen by Dr. MacMillan in May 1996. It was acknowledged, however, that Dr. Prostic did not see claimant during this period of time. He also acknowledged, after reviewing Dr. Mead's findings, that claimant was able to perform modified work, and that modified work was offered to claimant.

As of the regular hearing, claimant had returned to work with respondent in an accommodated job, earning a comparable wage. The parties acknowledge, if this matter is found to be compensable, claimant has a 9 percent whole body functional impairment, with no work disability presently due.

## CONCLUSIONS OF LAW

The first issue concerns claimant's Motion to Dismiss this appeal. K.S.A. 1998 Supp. 44-551(b)(1) allows appeals from all final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by administrative law judges upon appeal to the Board, with the request required to be filed within ten days. There is no obligation under the Workers Compensation Act for a cross appeal to be filed. The Board's review is de novo on the record and, once an appeal is filed by any party, the Board has the authority to decide any and all issues pertaining to the case presented to the administrative law judge, whether they were listed in the application for review or not. DeViney v. Oakwood Villa Care Center, a.k.a. American Health Foundation, Docket No. 179,026 (October 1996).

K.A.R. 51-18-6 allows for the voluntary dismissal of an application for review before the Workers Compensation Board "upon the agreement of all parties to the review." No statute nor administrative regulation allows for the dismissal of an appeal by one party.

Claimant requested respondent agree to the dismissal of the appeal, but respondent refused. Therefore, the claimant's Motion to Dismiss Appeal is denied.

In proceedings under the Workers Compensation Act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. *See* K.S.A. 44-501 and K.S.A. 1995 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case, and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant alleges accidental injury on November 2, 1995, while lifting at work. However, when claimant was first approached by both a coworker and her supervisor, she denied any work-related injury, attributing her pain symptoms to a cold, which she believed had settled in her back. Claimant first began receiving treatment through the office of Dr. Maria Palmeri, a family practice physician. When claimant met with Mr. Ronald Haulmark, the physician's assistant for Dr. Palmeri, she advised him of a lifting incident at home while moving furniture and of the cold. Claimant gave no history of a work-related injury. When claimant met with Dr. Palmeri on two separate occasions, she failed to provide a history of a work-related injury. Claimant did advise Dr. Mead of a work-related injury, but this did not occur until November 28, 1995, nearly four weeks after claimant's alleged date of accident.

The Appeals Board concludes that, had claimant suffered a sudden onset of pain while lifting boxes on November 2, 1995, she would have advised a coworker or her supervisor or the first treating physicians who examined her for this incident. Claimant had two prior workers' compensation injuries and had reported both on the date they occurred. For whatever reason, in this instance, claimant elected to keep her alleged work-related injury secret, for nearly four weeks, from all persons with whom she had contact. The Appeals Board finds no rational explanation for this action on claimant's part.

The Appeals Board finds that claimant has failed to prove accidental injury arising out of and in the course of her employment on the date alleged.

In so finding, the Appeals Board renders the remaining issues in this matter moot.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample dated April 22, 1998, should be,

and is hereby, reversed, and that claimant, Rita M. Rennert, is denied an award against the respondent, Dillon Companies, Inc., a qualified self-insured, for an alleged injury occurring on November 2, 1995.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

| | |
|---|---|
| Rebecca J. Ramsay, RPR | $1,400.35 |
| Metropolitan Court Reporters | 645.50 |

**IT IS SO ORDERED.**

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Scott J. Mann, Hutchinson, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director